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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1971

IOWA BEEF PACKERS, INC.,

Petitioner,

v.

EDWARD D. THOMPSON
(and 13 other individuals),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA ON BEHALF OF IOWA BEEF PACKERS, INC.

LOUIS S. GOLDBERG
Counsel for Petitioner
300 Commerce Building
Sioux City, Iowa 51101

P. L. NYMANN
Co-Counsel for Petitioner
P. O. Box 515
Dakota City, Nebraska 68731

LOUIS S. GOLDBERG
and
P. L. NYMANN
On the Petition

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IN THE

Supreme Court of the United States

October Term, 1971

No.

IOWA BEEF PACKERS, INC.,

Petitioner,

v.

EDWARD D. THOMPSON, JAY NOLLEN,
KENNETH A. HARDER, DONALD J. SPORRER,
LAWRENCE W. KENNEDY, ALBERT WEAVER,
JAMES R. MORGAN, VAL JEAN JOHANNSEN,
RAYMOND JAMES JOHNSON, LUVERNE M. HOFFMAN,
CAROL W. VENNINK, BEN J. LACKMAN,
LARRY JAMES LARRISON, LAWRENCE J. KABELA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA ON BEHALF OF IOWA BEEF PACKERS, INC.

Petitioner, Iowa Beef Packers, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Iowa, filed April 9, 1971, affirming the judgment of the District Court of Crawford County, Iowa.

Opinions Below

The trial court's ruling, denying petitioner's Motion for Separate Adjudication of Law Points (that is, to dismiss for respondents' failure to invoke the grievance procedures of the collective bargaining agreement), on March 5, 1968 is printed in the appendix, *infra*, pages 1a - 2a. The Final Judgment and Decree by the trial court, filed October 20, 1969 is printed in the appendix, pages 3a - 4a. The Opinion of the Supreme

Court of Iowa, filed April 9, 1971 is reported at 185 N.W.2d 738 and is printed in the appendix, pages 8a - 23a.

Jurisdiction

The Opinions (majority and dissenting) of the Supreme Court of Iowa are dated and were entered, on April 9, 1971. The Clerk of that Court informs me that entry of Judgment in that Court must be deferred as there is on file the Stay Order dated April 29, 1971; the full text of that Order is printed in Appendix pages 6a - 7a. The statutory provision believed to confer on this court jurisdiction to review that judgment by writ of certiorari is 28 U.S.C. Section 1257 (3); and we believe the applicable rule of this Court is Rule 19 (1) (a).

Questions Presented

1. Whether, in the circumstances of this case, the prevailing opinion in the Supreme Court of Iowa erroneously read or erroneously applied the rule of the prevailing opinion in *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 27 L.Ed.2d 456, 91 S.Ct. 409 (January 13, 1971).

2. Is an employee, whose employment is in commerce or affects commerce, required to attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress, where, as here, his grievance arises from a right given the employee simply by that contract (a right to work-free mealtime) (and the breach of that right by the employer); or may the employee completely by-pass those grievance procedures and sue at once under Section 16 (b) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 201-219 (which act makes no provision for work-free mealtime)?

3. Where, as here, the Collective Bargaining Agreement awards the employee a regular rate of pay and overtime pay (and many "fringe" benefits) materially better than the minimum requirements of FLSA, may the employee who shares the benefits of that contract reject the contract obligation of grievance procedure as his remedy and seek, instead, the generalized remedy of action under FLSA?

4. Whether to permit a choice of remedies, between arbitration or suit, would tend to frustrate or erode the policy of Congress and this Court to fashion a body of arbitration law in implementing national labor relations policy, where, as here, the claim is simply for contract overtime pay for the employer's failure to honor a contract agreement to allow a work-free meal period.

5. Whether the Supreme Court of Iowa, in Division II of its prevailing Opinion (we do not here challenge its Division I), erred in sustaining the Ruling of the Trial Court rejecting petitioner's motion to require utilizing the contract grievance procedures.

STATUTES

Labor Management Relations Act, 1947 (LMRA) Section 203 (d), 61 Stat. 153, Section 301 (a) 61 Stat. 156, 29 U.S.C. Section 173 (d) and 185 (a), (in appendix, page 24a).

United States Arbitration Act, originally enacted by Act of February 12, 1925, c. 213, 1-15, 43 Stat. 883-886, codified in 1947 into Title 9, U.S.C., now 9 U.S.C. Section 3 (in appendix, page 25a).

Fair Labor Standards Act (FLSA), Act of 1938 as amended, now 29 U.S.C. 201-219, Section 16 (b), (in appendix, page 26a).

Statement of the Case

The 14 plaintiffs (respondents here), each for himself, brought 14 separate actions, by the same law firm, in the District Court of Crawford County, Iowa, against petitioner, claiming overtime pay, liquidated damages, attorney fees and costs under the Fair Labor Standards Act. The case was tried by ordinary proceedings without a jury. Not until the trial were the 14 cases consolidated; they were also consolidated for appeal to the Supreme Court of Iowa (Iowa's highest court). Appendix, page 5a.

All respondents were employed by petitioner in employment in interstate commerce or affecting commerce. Petitioner is engaged in the processing of meat and its distribution and sale throughout the United States. All respondents were em-

ployed in the maintenance department, their duties being chiefly to maintain and repair plant machinery and equipment used by petitioner in the processing of meat.

Respondents' employment was governed by the Collective Bargaining Agreement effective from and after February 12, 1965; made between petitioner and Associated Employees Organization ("the Union"). In that contract, Article XIV provides for a "lunch period" (appendix, page 27a); it is agreed that the period was to be of 30 minutes' duration.

The respondents, in their action at law, asserted that during the period of two years preceding the filing of their actions (13 filed on April 21, 1967, and one on Dec. 12, 1967) they were, in effect, denied their contract right of a 30-minute work-free meal period, in that they were required to be "on call" during their lunch period, each work day. Accordingly, each claimed to be entitled to pay at the contract overtime rate for each such half-hour during the period of two years. The Trial Court found these facts in favor of respondents (appendix pages 3a - 4a); these findings were affirmed by Division I of the prevailing Opinion of the Supreme Court of Iowa (appendix pages 8a - 11a); while petitioner does not concur in the correctness of those findings, we do not here challenge them.

However, petitioner did challenge, by Answer and by Motion in each of the 14 cases (both in the Trial Court and in the Supreme Court of Iowa), all of the actions as premature because all respondents (by their own admission) failed to attempt to exercise the grievance procedures contracted for in the Collective Bargaining Agreement. The Trial Court overruled petitioner's Motion (appendix pages 1a - 2a); the Supreme Court of Iowa, in Division II of its prevailing Opinion, affirmed, (appendix, pages 12a - 14a); hence this Petition for a Writ of Certiorari.

The Collective Bargaining Agreement in its Article III (appendix page 27a) states the "intent and purpose of the parties" to be to "promote and improve the industrial and economic relationships between the Company, the Union and its members..."

Article VII of that Agreement (appendix page 27a) deals with "Hours of Work" and provides for time and one-half (1½) to be paid for hours worked in excess of 8 in any day (and in excess of 40 hours in any one week).

Article XX - "Grievance Procedure" (appendix pages 27a - 29a) provides for "the Union or any individual employee" a grievance procedure in 3 steps, concluding with arbitration provisions.

Respondents' substantive claims rest solely and simply on the contract provision for work-free meal-time and the petitioner's alleged breach of that commitment. The Fair Labor Standards Act contains no provision for meal-time. Respondents have availed themselves of all the benefits of the Collective Bargaining Agreement (benefits that are materially greater than those required by FLSA); but, admittedly, respondents refused to fulfill their contract obligation to attempt grievance procedures and arbitration as their remedy.

Federal Questions: How Raised

Petitioner raised the question here at issue in paragraph 10 of its Answers in each of the 14 cases in the Trial Court. The full text of paragraph 10 now follows:

> "10. Plaintiff states affirmatively that it is now admitted upon this record that Plaintiff's employment at Defendant's plant in Denison was covered by Collective Bargaining Agreements at all times material herein between Associated Employees Organization and Defendant and that Exhibit 'A' attached to the Request for Admissions is a true and correct copy of the Collective Bargaining Agreement for the time specified therein and that Plaintiff did not take any of the Steps permitted under the Grievance Procedures of the Collective Bargaining Agreements. Accordingly Plaintiff having failed to exhaust such Grievance Procedures is not entitled to bring this action and this action should be dismissed for such failure.
>
> "WHEREFORE Defendant prays that Plaintiff's action be dismissed at Plaintiff's costs."

Then, before proceeding to trial, petitioner filed its Motion for Separate Adjudication of Law Points; that Motion, in full text, follows:

"Motion for Separate Adjudication of Law Points

"COMES NOW the Defendant and moves the Court to separately hear and determine the point of law raised in Paragraph 10 of its Answer, as provided by Rule of Civil Procedure 105, because said point of law raises a legal issue directed to substantially the whole if not the whole of the Plaintiff's alleged cause of action and adjudication favorably to the Defendant will dispose of substantially all, if not all, of the case."

The Ruling of the Trial Court, overruling that Motion, is printed in the appendix, pages 1a to 2a.

The entire Record of the Trial Court was appealed by petitioner to the Supreme Court of Iowa; that Court, in Division II of its prevailing Opinion, affirmed the ruling and judgment of the Trial Court (appendix pages 12a to 14a).

Summary of Petitioner's Reasons

An employee who asserts a substantive right arising from a Collective Bargaining Agreement must, for remedy, attempt to utilize the grievance and arbitration provisions of that Agreement. He may not proceed directly to court action under the Fair Labor Standards Act.

Our view is supported by (a) Congressional policy declared in the Labor-Management Relations Act, 1947; (b) the decisions of this Court in formulating procedure in a national labor relations policy, with special reference to *Republic Steel Corporation* v. *Maddox*, (1965), 379 U.S. 450, 85 S.Ct. 614, 13 L.Ed.2d 580; (c) four United States Courts of Appeals decisions in Fair Labor Standards Act cases; (d) the dissenting opinion of the Supreme Court of Iowa in the present case; and (e) the dissenting opinion in *U. S. Bulk Carriers, Inc. v. Arguelles, supra.*

Nor do the prevailing opinion in *Arguelles* or in this case stand in the way. *Arguelles* is distinguishable on the facts and on the law.

Maddox, not *Arguelles*, applies here.

Argument Amplifying the Reasons Relied On

The prevailing Opinion below (it states "the question is close") accords priority to court action under the Fair Labor Standards Act as against grievance procedure and arbitration. In doing so, that Opinion rests largely, if not wholly, on the prevailing Opinion of this Court in *U. S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 27 L.Ed.2d 456, 91 S.Ct. 409, decided January 13, 1971. With all deference to the Iowa Opinion, we believe that *Arguelles* does not warrant the Iowa conclusion in our case; with all respect, we believe the Iowa prevailing Opinion reads *Arguelles* erroneously or applies it erroneously.

Opposed to that Iowa Opinion are these: Four decisions of United States Courts of Appeals, cited in the opinion itself, ruling "In accordance with this general rule," .... "that employees must attempt to arbitrate FLSA claims before they can come to court."; the Iowa dissenting Opinion in our case, discussing, inter alia, the same four Courts of Appeal decisions; the dissenting Opinion in *Arguelles* in this Court; and we believe the considerations stated by Justice Harlan in his concurring opinion in *Arguelles* may tend to support our view in favor of requiring that utilization of grievance procedures should apply in our case. We shall return to these later, herein.

Arguelles Distinguished:

We begin by indicating material differences in the facts and in the law, distinguishing *Arguelles*. The substantive claims of respondents here rest entirely and simply on the Collective Bargaining Agreement. That contract, Article XIV (appendix page 27a) (not FLSA) commits the Company to allow its employees one-half hour of work-free meal-time; for any breach of that obligation, the Company (petitioner) must pay as for time worked, at the overtime rates stipulated in the

contract; and those rates are materially higher than the FLSA minimum provisions. By constrast, in *Arguelles*, his Brief (page 15) asserted that "the well-spring of his right is not the collective bargaining agreement, but the text of the statutes and the court's interpretation of them." Here, the Iowa prevailing opinion itself recites: "Under the contract between the union and defendant, the men were supposed to have a thirty-minute lunch period." (Appendix, page 9a, second paragraph).

On the law side, there is sharp distinction, too. In *Arguelles*, the statute imposed the civil penalty, irrespective of any improper shortage, as a weapon to enforce prompt payment of seamen's wages; the statute was traced as far back as 1790; it evidenced the continuing traditional policy of our government in solicitude for the protection of seamen as wards of admiralty; it singled out a special sub-class of employees for special and different treatment. All this is stressed throughout the briefs and prevailing opinion in this Court.

Not so, the FLSA; the FLSA is written in broad, generalized strokes, suited to a wide variety of circumstances and of needs; like the LMRA, the FLSA is open to all employees engaged in commerce or in activities affecting commerce; it is one of a set of Acts serving to formulate national labor policy, all of relatively recent vintage; indeed, FLSA was enacted a decade later than the United States Arbitration Act of 1925. Moreover, FLSA contains so many administrative provisions and such extensive authority to the Wage and Hour Administrator for court actions, including injunctive relief, that there is need in FLSA *to make clear that action in court is available to the individual employee who is not shielded by a Collective Bargaining Agreement and a Union.*

Indeed, in the typical FLSA case, there is no substantive contract right; there is no breach; the wrong consists of violation of the statute; there could be no remedy if the statute did not provide a remedy by administrative enforcement or by action in court. Actually, the administrative procedures are so efficient that only a minor fraction of cases get into the court.

Grievance Procedures a Better Remedy:

The case at bar demonstrates rather neatly that, given a Collective Bargaining Agreement, the grievance procedures and arbitration provide a remedy superior to individual action in court. Here we have 14 respondents, with 14 separate lawsuits (apparently so deemed advantageous by the one firm of lawyers who acted for all fourteen), with 14 separate sets of pleadings and motions, finally consolidated for trial and appeal. A single, simple grievance claim under the Agreement would have sufficed. It is interesting to note that the court did not award "liquidated damages" to any of the claimants. Except for the issue as to failure to attempt grievance procedures, all the questions in the 14 cases were purely factual, singularly suited to arbitration by persons well versed in the industry: (a) Were the employees subject to call during their supposedly work-free meal-time? (b) How much is due each? Also, implicit in all four United States Courts of Appeals FLSA cases cited in both of the opinions of the Supreme Court of Iowa, is the point that the arbitrators can and will apply the relief provisions of FLSA; and in *Evans v. Hudson Coal Co.*, (1948), CA-3, 165 F.2d 970, the court is explicit: "But if the arbitration process proceeds to an award which is not in accordance with the provisions of the Fair Labor Standards Act or any other applicable statute, Sections 10 and 11 of the Arbitration Act provide means for its vacation, rehearing, modification or correction."

It may not be amiss to observe here that, unlike so many court cases under FLSA, petitioner was not charged with substandard wage rates, either as regular rates of pay or as overtime, wrongs which FLSA is especially designed to remedy. Quite the contrary: under the Collective Bargaining Agreement the respondents enjoy rates of pay, both regular and overtime, at substantially twice the level commanded by FLSA (to say nothing of such significant "fringe" benefits as profit-sharing, a guarantee of 40 hours of pay each week, vacation pay, rest periods on company time, insurance benefits at no cost to employees, etc.). Enjoying these superior advantages all derived from the Collective Bargaining Agreement, the respond-

ents admittedly elected to refuse to respect their obligations for grievance procedure and arbitration under that Agreement.

Discussion of the Iowa Opinions:

The prevailing Iowa opinion states (appendix page 13a): "The Fair Labor Standards Act too antedates the Labor Management Relations Act." Literally, that may be a correct statement. However, the United States Arbitration Act dates from 1925; in 1947 Section 301 of LMRA brought the arbitration policy to the forefront, since which time (20 years before the cases at bar were begun), FLSA and LMRA have marched hand in hand in American labor policy. Also, even before 1947 the 1925 Arbitration Act was held to be applicable to FLSA cases: *Donahue* v. *Susquehanna Collieries Co.*, (1942) CA-3, 138 F.2d 3 and *Watkins* v. *Hudson Coal Co.*, (1945) CA-3, 151 F.2d 311.

The dissenting Opinion of the Supreme Court of Iowa is, we believe, a persuasive brief for petitioner's position; we are happy to be privileged to present it to this Court. May we, with complete respect, point to three places in that minority Opinion where, we believe, our view and the view of the dissenting Justices are set forth with somewhat less definiteness than they merit? In all three instances the portions that we shall quote might be read as recognizing that the substantive rights claimed by the respondents derive from statute; the correct view, we are convinced, is that their substantive rights flow simply from the Collective Bargaining Agreement. The sentences here concerned are these: (Appendix page 16a): "Plaintiffs do not quarrel with these general rules but claim that as their rights arise out of a federal statute rather than out of the collective bargaining contract they have the right to elect whether to file suit or follow the grievance procedures in the agreement." (Appendix page 20a): "These considerations are just as strong under a claim for overtime wages under the FLSA as they would be under a contract provision." (Appendix page 20a): "Any distinction between the instant case and *Republic Steel Corporation* v. *Maddox* must be based on the fact that plaintiffs' rights here are based on statute (FLSA) and plaintiff's rights in *Maddox* were based on

the contract." The sentences we have quoted were probably written in terms of remedial rights rather than in terms of substantive rights; so viewed, there is no confusion, and our case is the stronger.

Meal-time Is Strictly a Contract Right:

Given the employer-employee relationship, there is nothin the FLSA that requires an employer commitment to work-free lunch-time. Where an employer makes such a commitment by contract, he must, of course, bear the consequences of a breach. In this, the FLSA is quite unlike the statute in *Arguelles;* there the statute granted (to a special group as "wards of the Admiralty") both the right and the remedy. The FLSA remedy may (not must) include liquidated damages and attorney fees, enforceable, as we have noted, by arbitration.

Discussion of the Cases:

To avoid burdening this Court with repeated citations and quotations, may we indicate briefly that the applicable underlying points and case citations supporting petitioner's views are set forth in the four opening paragraphs of Division II of the prevailing Opinion of the Iowa court (appendix page 12a) (but the majority "are inclined to think" "that the United States Supreme Court will apply *Arguelles* to FLSA cases" "although the question is close.") (appendix page 13a); and they appear at considerable length, with quotations, in the *dissenting* Opinion in Iowa (appendix pages 15a to 23a); and in the dissenting Opinion of this Court in *Arguelles*. We respectfully incorporate those as part of petitioner's argument, and limit our discussion to the following:

Republic Steel Corporation v. *Maddox* (1965), 379 U.S. 650, 85 S.Ct. 614, 13 L. Ed.2d 580 was an action brought in a *State* court in Alabama for severance pay under a collective bargaining agreement. *Maddox* made no effort to utilize the grievance and arbitration procedures. Instead, he sued for breach of contract. The trial court awarded him a money judgment; two higher State courts of Alabama affirmed. This Court reversed. In an opinion by Mr. Justice Harlan, writing for eight members of the Court, this Court ruled that the gen-

eral federal rule applies, that the employee must attempt use of the contract grievance procedure. We respectfully submit that *Maddox*, (not *Arguelles*), rules our case.

In *Arguelles*, Mr. Justice White, writing for four members of the Court, stated (p. 473 of 27 L.Ed.2d) that all issues in that case (including the question of the statutory penalty) were suitable for arbitration. And, on the same page, he noted that "circuit courts of appeal both before and after passage of Section 301 have required that FLSA employee's claims for liquidated damages under 29 USC section 216 (b) for failure to pay overtime wages be referred to contractual procedures before being presented to the court."

The FLSA Cases:

We find four such FLSA cases: *Donahue* v. *Susquehanna Collieries Company* (CA 3) (1943) 138 F.2d 3 (claim for overtime wages); *Watkins* v. *Hudson Coal Company* (CA 3) (1945), 151 F.2d 311 (cert. denied 1946, 327 U.S. 777 and 816) (claim for overtime wages, liquidated damages, attorney fees and costs) (in that case the opinion states "A brief has also been filed for the Administrator of the Wage and Hour Division, United States Department of Labor"); *Evans* v. *Hudson Coal Company* (CA 3) (1948), 165 F.2d 970 (claim for regular and overtime pay, liquidated damages, fees and costs); and *Beckley* v. *Teyssier* (CA 9) (1964), 332 F.2d 495 (claim for overtime pay for time in travelling between job sites, and liquidated damages, fees and costs). We may observe, in passing, that *Gatliff Coal Co.* v. *Cox* (CA 6) (1944), 142 F.2d 876, is no longer to the contrary, having been decided three years before the 1947 LMRA.

National Labor Relations Policy:

The dominant consideration, we respectfully submit, is that there be no frustration or erosion of the Congressional policy declared in the 1947 LMRA and the endeavors of this Court seeking to formulate harmonious procedures in a national labor relations policy. And is it not of significant public importance that the contours of the *Arguelles* case be delineated before the uncertainties generated by *Arguelles* with-

in the Supreme Court of Iowa spawn a host of conflicting and confusing decisions throughout the United States?

CONCLUSION

For the foregoing reasons, we respectfully submit, this petition for a writ of certiorari should be granted.

Dated at Sioux City, Iowa, June 7, 1971.

Respectfully submitted,

LOUIS S. GOLDBERG
Counsel for the Petitioner
300 Commerce Building
Sioux City, Iowa 51101

P. L. NYMANN
Co-Counsel for the Petitioner
P. O. Box 515
Dakota City, Nebraska 68731

LOUIS S. GOLDBERG
and
P. L. NYMANN
On the Petition

Hamilton Printing – Chicago, Illinois

(APPENDIX)

Ruling of Trial Court Denying Petitioner's Motion to Dismiss

IN THE DISTRICT COURT OF IOWA, IN AND FOR CRAWFORD COUNTY

EDWARD D. THOMPSON, JAY NOLLEN, KENNETH A. HARDER, DONALD J. SPORRER, LAWRENCE W. KENNEDY, ALBERT WEAVER, JAMES R. MORGAN, VAL JEAN JOHANNSEN, RAYMOND JAMES JOHNSON, LUVERNE M. HOFFMAN, CAROL W. VENNINK, BEN J. LACKMAN, LARRY JAMES LARRISON, LAWRENCE J. KABELA, Plaintiffs,	No. 21894 - Law Applicable to Law Nos. 21895, 21896, 21897, 21898, 21899, 21900, 21901, 21902, 21903, 21904, 21905, 21906, 22106
vs.	
IOWA BEEF PACKERS, INC., Defendant.	

Before the HONORABLE A. J. BRAGINTON, Judge.

Ruling filed March 5, 1968 (in each of 14 cases).

On Motion for Separate Adjudication of Law Points (motion filed September 19, 1967).

The defendant is asking the court to determine the points of law raised in paragraph 10 of it's answer. (sic)

In this action the plaintiff is seeking compensation for 30 minute meal periods for which he has not been compensated. Plaintiff asserts that in the performance of his duties in his employment by the defendant he was required to be subject to call during said meal periods, and that by reason

of his being subject to call, said period of time was and is a necessary and integral part of defendant's operation and and therefore such periods are compensable under the act. Defendant admits plaintiff was not paid for such periods, and asserts that plaintiff was not required to be subject to call during said periods and such periods of time are not compensable.

If upon trial it was found that under the act such 30 minute meal periods are compensable, the fact that his employment in defendant's plant was subject to a collective bargaining agreement or that plaintiff did not proceed as provided under the grievance procedures of such agreement and thus failed to exercise the grievance provisions of the agreement, such does not preclude recovery by the plaintiff for wages due for work which is compensable under the act, and it follows that defendant would not be entitled to have plaintiff's case dismissed as alleged in paragraph 10 of it's answer. (sic)

This court determines that the right of recovery for work performed which is compensable under the provisions of the Fair Labor Standards Act of 1938 as amended, cannot be restricted, abrogated or nullified by any agreement entered into by an employee and employer, or by employees with their employer, or by and through a collective bargaining agreement entered into with the employer and the representative of the employees.

BY THE COURT: (signed) A. J. BRAGINTON,
Judge.

Final Judgment and Decree of Trial Court

IN THE DISTRICT COURT OF IOWA, IN AND FOR CRAWFORD COUNTY

EDWARD D. THOMPSON, (and 13 others) Plaintiffs, vs. IOWA BEEF PACKERS, INC., Defendant.	No. 21894 - Law Applicable to Law Nos. 21895, 21896, 21897, 21898, 21899, 21900, 21901, 21902, 21903, 21904, 21905, 21906, 22106

Before the Honorable A. J. BRAGINTON, Judge.

On October 20, 1969, there was filed

Final Judgment and Decree

On the 5th day of February, 1969, this court entered a judgment determining that the Plaintiffs are entitled to recover for their one-half hour lunch period at the applicable wage scale or rate as such maintenance employees of the Plaintiff for such time as they were so employed by the Defendant company during the two-year period immediately preceding the commencement of their respective actions.

On July 8, 1969, as the result of a motion to amend and enlarge the findings and to modify the judgment, this court directed the parties to submit the hours of employment and rate of pay pertaining to each Plaintiff under the judgment entered herein on February 5, 1969, and the court therein determined that none of the Plaintiffs had shown themselves to be entitled to liquidated damages.

On the 15th day of September, 1969, this court by order directed that a hearing be held on this date relative to the matter of the attorney fees, and on this date the parties have filed a stipulation in which the basic compensation of each

Final Judgment and Decree of Trial Court

of the Plaintiffs was fixed for the purposes of the suit without waiving any right of appeal. At said hearing the court approved certain attorney fees in respect to each of the cases.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that the Plaintiffs in each of their respective cases have and recover from the Defendant the amounts hereinbelow set forth after their names, and in each of the respective cases the Plaintiff shall have and recover the total judgment as shown therein, with interest at the legal rate from and after February 5, 1969, together with the costs in each action to be entered by the clerk.

NAME	Basic Compensation	Attorney Fees	Total Judgment
Edward D. Thompson	$1,261.33	$200.00	$1,461.33
Jay Nollen	1,288.87	200.00	1,488.87
Kenneth A. Harder	244.82	150.00	394.82
Donald J. Sporrer	1,338.44	200.00	1,538.44
Lawrence W. Kennedy	1,338.44	200.00	1,538.44
Albert Weaver	1,288.87	200.00	1,488.87
James R. Morgan	1,338.44	200.00	1,538.44
Val Jean Johannsen	1,338.44	200.00	1,538.44
Raymond James Johnson	1,338.44	200.00	1,538.44
Luverne M. Hoffman	1,338.44	200.00	1,538.44
Carol W. Vennink	1,261.33	200.00	1,461.33
Ben J. Lackman	1,261.33	200.00	1,461.33
Larry James Larrison	658.48	150.00	808.48
Lawrence J. Kabela	274.12	150.00	424.12

The clerk is hereby ordered and directed to enter judgment in favor of the Plaintiff in his respective action against the Defendant for the basic compensation and attorney fees as above set out, together with the costs in said action, said judgment to bear interest at the legal rate from February 5, 1969.

BY THE COURT: (signed) A. J. BRAGINTON,
Judge.

Order of Supreme Court of Iowa to Consolidate 14 Cases

IN THE SUPREME COURT OF IOWA

EDWARD D. THOMPSON, JAY NOLLEN, KENNETH A. HARDER, DONALD J. SPORRER, LAWRENCE W. KENNEDY, ALBERT WEAVER, JAMES R. MORGAN, VAL JEAN JOHANNSEN, RAYMOND JAMES JOHNSON, LUVERNE M. HOFFMAN, CAROL W. VENNINK, BEN J. LACKMAN, LARRY JAMES LARRISON, LAWRENCE J. KABELA, Plaintiffs,	No. 21894 - Law Applicable to Law Nos. 21895, 21896, 21897, 21898, 21899, 21900, 21901, 21902, 21903, 21904, 21905, 21906, 22106
vs.	
IOWA BEEF PACKERS, INC., Defendant.	

May 20, 1970.

Order of Consolidation

And now on this 20th day of May, 1970, there having been presented to the undersigned, one of the Justices of the Supreme Court of Iowa, a joint Motion by all parties for the consolidation of these cases on appeal, with a waiver of notice of hearing by all parties;

And it appearing that for good cause shown the cases should be consolidated for purposes of appeal.

FOR THE COURT: (signed) MAURICE E. RAWLINGS
Justice of Supreme Court of Iowa

Order by Supreme Court of Iowa, Granting Stay

IN THE SUPREME COURT OF IOWA

EDWARD D. THOMPSON, JAY NOLLEN, KENNETH A. HARDER, DONALD J. SPORRER, LAWRENCE W. KENNEDY, ALBERT WEAVER, JAMES R. MORGAN, VAL JEAN JOHANNSEN, RAYMOND JAMES JOHNSON, LUVERNE M. HOFFMAN, CAROL W. VENNINK, BEN J. LACKMAN, LARRY JAMES LARRISON, LAWRENCE J. KABELA, Appellees,	)	April 29, 1971
vs.	)	ORDER
IOWA BEEF PACKERS, INC., Appellant.	)	213 / 54323

NOW on this 29th day of April, 1971, defendant's application to stay execution of procedendo herein, having come on for hearing pursuant to prior order, defendant-applicant having appeared by Attorney Louis S. Goldberg, of Sioux City, Iowa, plaintiff having appeared by Attorneys E. A. Raun and Michael Mundt, of Denison, Iowa, arguments were duly presented, the matter submitted and taken under advisement.

IT IS NOW ORDERED, ADJUDGED AND DECREED that execution of procedendo herein be and is hereby stayed for seventy (70) days from date hereof to allow defendant-applicant to petition the Supreme Court of the United States of America for review, and

IT IS FURTHER ORDERED in the event such petition be not filed within the aforesaid time, procedendo shall issue

upon expiration of said seventy (70) day period, and

IT IS FURTHER ORDERED, in event such petition be so filed within the time above prescribed, then the aforesaid stay shall remain in effect until the Supreme Court of the United States of America shall have finally acted upon such petition for review, and (1) if denied then procedendo shall thereupon issue, (2) if granted said stay shall be and remain in effect until the matter shall have been finally determined by the Supreme Court of the United States of America, and

IT IS FURTHER ORDERED, for good cause shown, bond is hereby waived.

DONE this 29th day of April, 1971, in Sioux City, Iowa.

(signed) MAURICE E. RAWLINGS
Justice, Supreme Court of Iowa

Majority Opinion by Supreme Court of Iowa

IN THE SUPREME COURT OF IOWA

EDWARD D. THOMPSON, JAY NOLLEN, KENNETH A. HARDER, DONALD J. SPORRER, LAWRENCE W. KENNEDY, ALBERT WEAVER, JAMES R. MORGAN, VAL JEAN JOHANNSEN, RAYMOND JAMES JOHNSON, LUVERNE M. HOFFMAN, CAROL W. VENNINK, BEN J. LACKMAN, LARRY JAMES LARRISON, LAWRENCE J. KABELA,

Appellees,

vs.

IOWA BEEF PACKERS, INC.,

Appellant.

Filed April 9, 1971

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54323

Appeal from Crawford District Court—A. J. BRAGINTON, Judge.

Appeal from judgment for plaintiffs for overtime compensation under Fair Labor Standards Act.—Affirmed.

P. L. NYMANN, of Dakota City, Nebraska, for appellant.

RAUN & FRANCK, of Denison, for appellees.

UHLENHOPP, J.

The main question presented in this appeal is whether workmen are required to attempt contract arbitration before they can sue for overtime compensation under the Fair Labor

Standards Act (FLSA), 29 U.S.C.A. §§ 201-219.

The case was tried by ordinary proceedings without a jury. From the evidence the trial court could reasonably find that plaintiffs were maintenance men in defendant's plant near Denison, Iowa, during the period in question from April 28, 1965, to April 28, 1967. The plant was fairly new. During the first years many breakdowns occurred, necessitating much work by the maintenance men to avoid costly "down time." A bell was sounded when the men were needed. After the plant had been constructed, a lunch room for the maintenance men was added just off the kill floor so they could answer the bell more readily.

Under the contract between the union and defendant, the men were supposed to have a thirty-minute lunch period. The evidence clearly indicates, however, that until February of 1966, the lunch period existed more in name than in fact. On numerous occasions the men were obliged to answer bells during lunch. When they tried to eat lunch later, they would frequently be interrupted again by the bell.

Eventually one of the maintenance men undertook grievance procedure because he was not getting his lunch period. This precipitated a meeting by defendant's industrial relations officer with the maintenance men in February, 1966. That officer instructed the men that they were free to leave the premises during their lunch period.

The instructions appear to have been honored by the employer more in the breach than in observance. Breakdowns continued to occur, the production people needed immediate help from the maintenance men, the bell continued to be rung during lunch periods, and the maintenance men were expected to, and did, respond. The situation did not in fact change from what it had been. A procedure for two shifts of maintenance men was attempted, but did not prove efficacious.

On April 28, 1967, plaintiffs commenced this action for compensation for their lunch periods during the preceding two years. Shortly thereafter, the industrial relations offi-

cer dealt with the situation in a letter which was sent to each maintenance man. That letter, however, related to the future.

The collective bargaining contract between the union and defendant provided grievance procedure including arbitration. The trial court overruled defendant's contention that the men had to arbitrate before they could sue, held on the facts that the maintenance men were actually on call during their lunch period for the two years in question, and granted the men compensation accordingly. Defendant appeals.

Defendant makes three contentions here. First, the workmen were not on call during lunch periods after the instructions were given in February 1966 to the effect they could leave the premises during such periods. Second, one of the workmen who said he always got his 30 minutes for lunch at some time during the day could not in any event claim he had not gotten his lunch periods. Third, the men had to attempt arbitration before they could sue.

I. Defendant's first two contentions are primarily factual and may be considered together. The trial court's findings of fact, if supported by substantial evidence, bind us. *Rule* 344(f)(1), *Rules of Civil Procedure*.

The legal principle regarding compensable time under FLSA for being "on call" was announced in *Armour & Co.* v. *Wantock*, 323 U.S. 126, 65 S. Ct. 165, 89 L. Ed. 118. The decisions lay stress on whether the employees are actually free to pursue their own interests during their lunch period. If, in fact, the employer retains a hold on the employees for services when needed during a lunch period, so that the employees are not actually at liberty, the period constitutes compensable time. *Glen L. Martin Nebraska Co.* v. *Culkin*, 197 F.2d 981 (8th Cir.); *F. W. Stock & Sons* v. *Thompson*, 194 F.2d 493 (6th Cir.); *Wirtz* v. *Minton Rendering Co.*, 54 Lab. Cas. Para. 31,876 (U.S. Dist Ct. N.D. Tex.); *Hofler* v. *Spearin, Preston & Burrows*, 51 Misc. 2d 758, 273 N.Y.S.2d 873.

Here the men had 30 minutes for lunch. It hardly seems reasonable that the parties contemplated the men would drive from the plant to their homes or other places, eat, drive back, and be back on time. In fact, a separate lunch building was provided for them on the premises, where they would hear the bell. On numerous occasions, both before and after February 1966, they were actually called during the lunch period. On cross-examination, defendant's witness LaFleur admitted with commendable candor, "If it was a serious breakdown and the men were present, were readily accessible, they were asked to help with the breakdown, yes; if they were on their lunch break. If they were called on their lunch break and given a lunch break later, the same thing could happen. They would have to answer the bell then, too." Defendant's witness Walker made somewhat similar admissions. Defendant's witness O'Brien, telling about frequent breakdowns before new equipment was installed in recent times, stated in a letter that "The maintenance men will remember the thousands of times they had to run because the boilers have dropped out"; "Many will remember the loss of steam that caused hours of dying time and lost profits"; "The maintenance men will remember the long hard hours of work put in on the sump under the coolers."

As to the period subsequent to February 1966, the trial court found the situation was no different than before—the men were actually on call. We do not say we would reach the same finding on the evidence, but substantial evidence supports the trial court's finding.

As to the contention that one workman actually got his 30 minutes for lunch each day, we think defendant misapprehends the rationale of *Armour & Co.* v. *Wantock*. The question is not whether a workman actually gets his 30 minutes without interruption. The question is whether he is on call during that period, or free to pursue his own interests. He may get his lunch times without interruption every day for a week or at various times throughout a given day. But if those times in fact belong to the employer, if the employee

is not free but is actually subject to call during those times, then the times are compensable. The trial court could reasonably find that such was the situation here.

We cannot sustain defendant's challenges to the findings of fact.

II. What about defendant's contention that plaintiffs had to attempt arbitration before they could sue? The contract under which plaintiffs worked contained a provision for four-step grievance procedure culminating in binding arbitration. Plaintiffs did not pursue that course but brought their complaint directly to court. Did they have the choice of arbitration or litigation, or were they obliged to try arbitration first?

Defendant is engaged in interstate commerce, and substantive federal labor law applies. *Humphrey* v. *Moore*, 375 U.S. 335, 84 S. Ct. 363, 11 L. Ed. 2d 370. The present controversy is undoubtedly arbitrable. *Donahue* v. *Susquehanna Collieries Co.*, 138 F.2d 3 (3rd Cir.). Agreements to arbitrate may ordinarily be specifically enforced. *United Steelworkers of America* v. *Warrior Gulf Navigation Co.*, 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409.

As a general rule, federal labor policy requires that employees seeking to assert grievances must initially attempt to use contract grievance procedure including arbitration. *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U.S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972; *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 85 S. Ct. 614, 13 L. Ed. 2d 580. These decisions are founded on § 301(a) of the Labor Management Relations Act of 1947 (LMRA), 29 U.S. C.A. § 185(a).

In accordance with this general rule, federal courts of appeal have held that employees must attempt to arbitrate FLSA claims before they can come to court. *Donahue* v. *Susquehanna Collieries Co.*, *supra*; *Watkins* v. *Hudson Coal Co.*, 151 F.2d 311 (3rd Cir.); *Evans* v. *Hudson Coal Co.*, 165 F.2d 970 (3rd Cir.); *Beckley* v. *Teyssier*, 332 F.2d 495 (9th Cir.). Some federal and state trial courts had previously held to the contrary. Annot., 24 A.L.R.2d 752.

The United States Supreme Court does not appear to have spoken on the problem as to FLSA claims, but it recently decided *U.S. Bulk Carriers v. Arguelles*, 91 S. Ct. 409, 27 L. Ed. 2d 456 (U.S.). A federal statute which antedates the Labor Management Relations Act, requires a master or owner of a vessel to pay seamen promptly, failing which the seamen are entitled to recover "two days pay for each and every day during which payment is delayed ... which sum shall be recoverable as wages in any claim made before the Court...." 46 U.S.C.A. § 596. In *Arguelles*, a majority of the Court thought that statute indicated Congressional intent to permit a seaman to sue without first attempting arbitration, which prevailed over Congressional intent favoring prior arbitration generally.

Does the Fair Labor Standards Act indicate similar Congressional intent, leading to the belief that the United States Supreme Court will apply *Arguelles* to FLSA cases? We are inclined to think so, although the question is close.

The Fair Labor Standards Act too antedates the Labor Management Relations Act. It also contains provisions for court proceedings and penalties, indeed, considerably more elaborate provisions than the statute involved in *Arguelles*. Under FLSA, an employer is liable to an employee for overtime pay and "an additional equal amount as liquidated damages." Action to recover such amounts "may be maintained in any court of competent jurisdiction." An employee may bring a class action with consent of the class—for himself "and other employees similarly situated." A plaintiff who is successful is entitled to "a reasonable attorney fee to be paid by the defendant, and costs of the action." The Secretary of Labor is authorized to supervise payment of unpaid overtime compensation owing an employee. The Secretary may sue to recover such overtime for an employee when so requested by him. All of these rights are contained in § 16 of FLSA, 29 U.S.C.A. § 216. In addition, the federal district courts have broad jurisdiction to enjoin violations of FLSA requirements. § 17, 29 U.S.C.A. § 217.

As stated, the federal decisions generally requiring arbitration are founded mainly on § 301(a) of the Labor Management Relations Act, giving federal courts jurisdiction to enforce collective bargaining contracts--including arbitration clauses of such contracts. We doubt that the general Congressional intent favoring arbitration can stand against the specific Congressional intent which is manifest in the Fair Labor Standards Act provisions giving employees strong and detailed rights in court. We think Congress intended that workmen should have free access to the courts in FLSA cases. We are the more persuaded of that view by the broad Congressional policy expressed in § 2 of FLSA, 29 U.S.C.A. § 202. There the objectives of the act are set forth, and those objectives encompass more than simply wage relief for employees; they include broad economic considerations--improvement in commerce among the states. The remedies provided by the act are part of the Congressional scheme to obtain employer compliance with the act and hence achievement of those broader objectives. We believe that if Congressional intent to allow a seaman to arbitrate or sue at his option is manifest in the seaman's act involved in *Arguelles*, as the Court held there, then an intent to give workmen such an option is also manifest in the Fair Labor Standards Act.

Affirmed.

BECKER, LEGRAND and REES, JJ. concur,
MASON, J. concurs in result,
STUART, J. and MOORE, C.J. dissent,
RAWLINGS, J. takes no part.

Dissenting Opinion by Supreme Court of Iowa

STUART, J., dissenting.

I respectfully dissent from division II and the result. As a consequence, I would not reach the merits of the case. Federal law applies. My study of the federal cases leads me to conclude that plaintiffs were required to exhaust the grievance procedures, including arbitration, contained in the collective bargaining agreement covering the plant where they were employed before they could institute this action for overtime pay under the Fair Labor Standards Act, 29 U.S.C.A. §201-219 (FLSA).

> "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress. If the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available." *Republic Steel Corporation* v. *Maddox*, (1965), 379 U.S. 650, 652, 85 S. Ct. 614, 13 L. Ed. 2d 580, 583.

Under federal law, agreements to arbitrate may be specifically enforced. *Local Union No. 721* v. *Needham Packing Co.* (1963), 254 Iowa 882, 885, 119 N.W. 2d 141, 142; *United Steelworkers of America* v. *American Mfg. Co.* (1960), 363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.* (1960), 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409; *United Steelworkers of America* v. *Enterprise Wheel and Car Corporation* (1960), 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 1424.

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts

should be resolved in favor of coverage." *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, *supra*, 4 L. Ed. 2d at 1417-1418; quoted in *Local Union No. 721* v. *Needham Packing Co.*, (1967), 160 Iowa 908, 912, 151 N.W. 2d 540, 543.

Plaintiffs do not quarrel with these general rules but claim that as their rights arise out of a federal statute rather than out of the collective bargaining contract they have the right to elect whether to file suit or follow the grievance procedures in the agreement. The narrow issue is whether a claim for overtime wages under the FLSA is an exception to these general rules.

Although the United States Supreme Court has not decided this issue, the federal circuit courts that have considered it hold grievance procedures must be exhausted before these statutory rights can be enforced in the federal courts. *Beckley* v. *Teyssier* (9th Cir. 1964), 49 CCH Lab. Cas. Par. 31,589, 332 F. 2d 945; *Evans* v. *Hudson Coal Co.* (3rd Cir. 1948), 14 CCH Lab. Cas. Par. 64,318, 165 F. 2d 970; *Watkins* v. *Hudson Coal Co.* (3rd Cir. 1945) 10 CCH Lab. Cas. Par. 62,761, 151 F. 2d 311; *Donahue* v. *Susquehanna Collieries Co.* (3rd Cir. 1943), 7 CCH Lab. Cas. Par. 61,758, 138 F. 2d 3; Anno. 24 A.L.R. 2d 754, 764-766, 779-780.

Earlier New York and federal district court cases to the contrary have not been followed. *Bailey* v. *Karolyna Co.* (1943, DC NY), 50 F. Supp. 142, CCH Lab. Cas. Par. 61,550; *Voutrey* v. *General Baking Co.* (1941, DC PA), 39 F. Supp. 974; *Garrity* v. *Bagold Corp.* (1943), 180 Misc. 120, 42 N.Y.S. 2d 257, mod. on other grounds 257 App. Div. 353, 46 N.Y.S. 2d 637; *McClintock* v. *Garment Center Capitol, Inc.* (1943), 112 NYJL 1022, CCH Lab. Cas. Par. 61,814; *Re City Bank Farmers Trust Co.* (1943), 179 Misc. 770, 39 N.Y.S. 2d 842.

The FLSA does not provide that such rights *shall* be enforced in the courts. If it did, a collective bargaining agreement providing for arbitration would be ineffective. In the

absence of a specific prohibition, the parties may agree between themselves how these rights shall be enforced.

"Is there anything about the Fair Labor Standards Act which removes claims under its terms from the arbitration clause? We may concede that Congress could have done so had it wished. It could have provided that any claim under the act was to be enforced by lawsuit only, notwithstanding any agreement between parties for any other method of settlement. There is no such express language. * * *

"* * * (W)e see nothing in the wording of the Fair Labor Standards Act which precludes arbitration of claims under it. No doubt it creates rights which make a basis of a claim by an employee against an employer who violates it. So does any contract. A claim under the act and a claim based on a contract, -- each is based on a legal right which claimant asserts against someone else. Arbitration is one way by which such right can be enforced. There is no reason why it cannot be availed of to secure rights under the Fair Labor Standards Act just as well as a right arising out of a contract or imposed by law as a consequence of a tort." *Donahue* v. *Susquehanna Collieries Co.* (3rd Cir. 1943), 7 CCH Lab. Cas. Par. 61,758, 138 F. 2nd 3.

In *Beckley* v. *Teyssier* (9th Cir. 1964), 49 CCH Lab. Cas. Par. 31,589, 332 F. 2d 945, plaintiffs brought an action in the federal court to recover overtime pay for traveling to and from work under the FLSA. The proceedings were stayed by the district court. The circuit court affirmed saying:

"The appellants contend that since they seek recovery under the provisions of the Fair Labor Standards Act and not under the Collective Bargaining Agreement, the district court erred in staying the civil action pending arbitration under the Collective Bargaining Agreement. Appellants support such contention by arguing that whether

the time spent by them in traveling to and from the barracks to the job site constitutes hours worked under the Fair Labor Standards Act is a legal question which must be determined by the courts without reference to the provisions of the Collective Bargaining Agreement, and presents a question which cannot be determined by an arbitrator. Appellants cite no provision of the Fair Labor Standards Act which precludes arbitration of claims arising under it. We have found none. * * *

"It is clear to us that the claims of appellants are ones growing out of the relation of employer and employee and necessarily involve the application and interpretation of the contract provisions above quoted, and therefore fall squarely within Article V of the Collective Bargaining Agreement. See *Evans* v. *Hudson Coal Co.*, (14 LC 64,318) 165 F. 2d 970 (3rd Cir. 1948). To sustain appellants' contention would be to emasculate the arbitration provisions contained in the Collective Bargaining Agreement."

The United States Supreme Court has approvingly referred to this line of cases. "The reports of both Houses on that Act (Federal Arbitration Act) stress the need for avoiding the delay and expense of litigation, and practice under its terms raises hope for its usefulness both in controversies *based on statutes* or on standards otherwise created." *Wilko* v. *Swan* (1953), 346 U.S. 427, 431-432, 94 S. Ct. 182, 98 L. Ed. 168, 174. (Emphasis added.)

It is clear to me that if plaintiffs had brought this action in federal court subject to the Federal Arbitration Act, 29 USCA §3, proceedings would have been stayed pending arbitration. Here, defendant asks for dismissal of the suit because plaintiffs failed to exhaust the grievance procedures of the collective bargaining agreement.

Is the obligation to exhaust the internal remedies in a collective bargaining agreement modified when a judgment is sought on jurisdictional grounds in a state court? I have

found no United States Supreme Court decisions on this question involving statutory rights under the FLSA, but an action in a state court by an individual for severance pay claimed to be due under the terms of a collective bargaining agreement was dismissed for failure to exhaust grievance procedures. *Republic Steel Corp.* v. *Maddox* (1965), 379 U.S. 650, 653, 85 S. Ct. 614, 13 L. Ed. 2d 580, 583-584.

In his opinion Mr. Justice Harlan sets forth the reasons for the strong federal policy favoring arbitration as follows:

"But unless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf. Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the plant. * * * Union interest in prosecuting employees grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. And it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so.

"A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence

upon both the negotiation and administration of collective agreements.' *Teamsters Local* v. *Lucas Flour Co.*, 369 U.S. 95. 103, 7 L. Ed. 2d 593, 599, 82 S. Ct. 571."

These considerations are just as strong under a claim for overtime wages under the FLSA as they would be under a contract provision. There is less reason to permit a lawsuit here than in *Maddox* where the claim was for severance pay, the plant was closed and no one held the position of foreman any longer with whom to initiate grievance procedures.

"Any distinction between the instant case and *Republic Steel Corporation* v. *Maddox* must be based on the fact that plaintiffs' rights here are based on statute (FLSA) and plaintiff's rights in *Maddox* were based on the contract.

I agree with the majority that *U.S. Bulk Carriers, Inc.* v. *Arguelles* (decided by the United States Supreme Court January 13, 1971) offers guidance on this question, but it guides me to the opposite result.

There a seaman brought an action in the federal district court for wages and a penalty alleged to be due under the provisions of 46 U.S.C. §596, which permits seamen to sue for wages in federal courts. The majority opinion (five justices) is based on statutory construction and reaches the conclusion that Congress in section 301(a) of the Labor Management Relations Act of 1947, 29 U.S. §185(a) did not intend to deprive seamen of a remedy they had had since 1790. The opinion held plaintiff could either sue in the federal courts or invoke the grievance procedures of the collective bargaining agreement.

Justice Harlan, one of the majority, concurred specially stating that the cases of *Smith* v. *Evening News Asso.* (1962), 371 U.S. 195, 83 S. Ct. 267, 9 L. Ed. 2d 246; *Republic Steel Corp.* v. *Maddox*, *supra*; and *Carey* v. *Westinghouse Corp.* (1964), 375 U.S. 261, 84 S. Ct. 401, 11 L. Ed. 2d 320, "evince the crucial role of the federal judiciary in forging the proper relationships among available arbitral, administrative, and

judicial forums for vindicating contractual and statutory rights of employers, unions, and employees. *In light of these cases, I cannot infer, from the mere provision by Congress of a federal judicial forum for enforcement of the wage claims of a subclass of workers' wages, that this Court is foreclosed from requiring arbitration under the collective-bargaining contract.*" (Emphasis added)

He makes the distinction between an individual's claim for wages based "simply on a contract" (*Maddox*) and a claim for wages growing out of a federal statute (*Arguelles* and the instant case) and states:

> "Where, however, the §301 dispute implicates federal statutory rights, it is incumbent upon this Court to fashion the relationships among forums according to an analysis of the policies underpinning both §301 and the federal statute the employee invokes, rather than simply transposing *ipso facto* the Court's labor arbitration jurisprudence."

He concluded:

> "And the difficulties of analyzing the respective boundaries of the contractual right and the statutory right forbode ill for the efficient resolution of disputes implicating both the contract right and the federal statutory right. But the matter is not one to be decided abstractly; it may well be that certain types of federal statutory benefits will lend themselves to arbitration or splitting without an unacceptable sacrifice in competing policy interests.
>
> "However, this is not such a statute, because the *very essence of the legislative policy at stake here is ensuring promptness in the payment of wages.* I think it obvious that the least desirable of all solutions would be to create a necessity for suits in both forums. In this circumstance, I think conflicting congressional policies are best reconciled by construing 46 U.S.C. §596 and §301 of

the Labor-Management Relations Act as securing to the seaman an option to choose between arbitral and judicial forums where he states a claim under both the contract and 46 U.S.C. §596." (Emphasis added.)

Justice White joined by Brennan, Stewart and Marshall, dissented stating: "In *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957), it was held that federal courts have jurisdiction to specifically enforce the arbitration provisions of the collective-bargaining agreement. And it has been clear at least since *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965), that absent extraordinary circumstances not alleged here, contractual grievance procedures must be exhausted before suit can be brought."

On the distinction between contract and statutory rights he said: "nor until now has there been any principle which requires contract rights to be resolved internally but directs statutorily created remedies to be presented to the court, at least where, as here, the availability of the statutory remedy rests on disputed issues which are cognizable under the arbitration clause. In fact, this Court and lower federal courts have endorsed the suitability of arbitration to resolve federally created rights. In *Wilko* v. *Swan*, 346 U.S. 427 (1953), the Court expressed 'hope for (arbitration's) usefulness * * * in controversies based on statutes * * * *' 346 U.S. at 432. And circuit courts of appeal both before and after passage of §301 have required that FLSA employee's claims for liquidated damages under 29 U.S.C. §216(b) for failure to pay overtime wages be referred to contractual grievance procedures before being presented to the court."

In view of the federal cases, the position of the minority and Justice Harlan's concurring opinion in *Arguelles* and his generally favorable view toward arbitration, I believe the federal law to be that congressional policies are best reconciled by holding that actions for wages under the FLSA are under the general rule that contract grievance procedures

must be exhausted before an action can be brought in the courts. There is nothing in the majority opinion to indicate disagreement with this conclusion. The peculiar facts which persuaded the court Congress did not intend to take away a traditional remedy in *Arguellès* are not present in this case.

I would dismiss the action as having been brought prematurely.

MOORE, C.J., joins in this dissent.

Labor-Management Relations Act

June 23, 1947, c. 120, Title II, Section 203, 61 Stat. 153, 29 U.S.C. Section 173 (d).

(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases. June 23, 1947, c. 120, Title II, § 203, 61 Stat. 153.

June 23, 1947, c. 120, Title III, Section 301, 61 Stat. 156, 29 U.S.C. Section 185 (a) et. seq.

§ 185. Suits by and against labor organizations—Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

United States Arbitration Act

Act of Feb. 12, 1925, c. 213, Section 3, 43 Stat. 883, codified July 30, 1947, c. 392, 61 Stat. 670, 9 U.S.C. Section 3.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.
July 30, 1947, c. 392, 61 Stat. 670.

Fair Labor Standards Act

29 U.S.C. Sec. 216, Section 16 (b) of the Act as amended.

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection.

Some Sections of the Collective Bargaining Argeement

AGREEMENT BETWEEN IOWA BEEF PACKERS AND ASSOCIATED EMPLOYEES ORGANIZATION

ARTICLE III – PURPOSE OF AGREEMENT

SECTION 1: It is the intent and purpose of the parties hereto that this Agreement shall promote and improve the industrial and economic relationships between the Company, the Union and its members as set forth herein and to set forth herein rates of pay, hours of work, and other conditions of employment to be observed between the parties hereto.

SECTION 2: It is recognized by both parties that they have a mutual interest and obligation in maintaining friendly cooperation between the Company and the Union which will permit safe, economical and efficient operation of the plants.

ARTICLE VII – HOURS OF WORK

SECTION 3: Time and one-half (1½) will be paid for hours worked in excess of eight (8) in any day. Time and one-half (1½) will be paid for all hours worked in excess of forty (40) in any one week.

ARTICLE XIV – MEALS

SECTION 1: A lunch period shall be provided no later than five (5) hours from the start of an employee's shift, except when the shift does not exceed five and one-half (5-½) hours.

ARTICLE XX – GRIEVANCE PROCEDURE

SECTION 1: Should the Union or any individual employee desire to process a grievance pertaining to a violation of the Agreement, the matter shall be handled according to the following steps:

STEP I

The employee involved, with a Union representative if he so desires, shall discuss the matter with his immediate supervisor. In the event he does not receive a satisfactory

answer, he shall within Ten (10) days of the knowledge of the incident submit a written grievance to his immediate supervisor. The supervisor shall provide a written answer to the employee within seven (7) days.

STEP II

If the matter is not settled in the first step, the Union grievance committee or any officers designated by the Union shall present the matter to the Plant Superintendent for his decision. Grievances in this Step must be presented within five (5) working days after the answer in the First Step. At this point the grievance presentation shall be made in writing on the Employee's and steward's own time. Meetings shall be scheduled as near as possible to shift changes.

STEP III

If the matter is not settled in the second step, the Union grievance committee or any officer designated by the Union shall present the matter to the Plant Manager for his decision. Grievances in this step must be presented in writing within five (5) days after the answer at the second step. The Plant Manager shall have five (5) working days within which to give his answer in writing to the Union. Prior to submission to arbitration, the Union may request a further reasonable extension of time for the purpose of holding a meeting with the Vice President of Industrial Relations or his Designee in an effort to resolve the grievance.

SECTION 2: ARBITRATION PROVISION – If at the final step of the Grievance Procedure the matter is not satisfactorily adjusted, the grievance or dispute may be submitted to an impartial arbitrator to be selected by mutual agreement of the parties. A written request for arbitration shall be made within thirty (30) days of the Step 3 answer. If within fifteen (15) working days after receipt of such written request the parties are unable to agree upon an arbitrator, either party shall request a list or lists of names from the

Federal Mediation and Conciliation Service. The Union and the Company shall then alternately strike names until a single arbitrator is left. He will then be selected as the arbitrator for the arbitration in question. His decision in the grievance shall be final and binding on the parties, provided he shall not have authority other than to apply the terms and conditions specifically set forth in the Agreement. The arbitrator shall submit his decisions, in writing, within thirty (30) days after the conclusions of the hearing, or hearings as the case may be. The compensation and necessary expenses of the arbitrator shall be borne equally by the Company and the Union.

SECTION 3: The parties agree that the time allowed to process grievances is adequate. If the Union fails to process a grievance in the time specified herein, the grievance in question is ended. However, if either party requests a reasonable extension, the time limit specified for the discussion between the Plant Manager and representative of the Union, the time specified in Section 1 hereof shall be extended.